



June 14, 2019

U.S. Office of Government Ethics
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Re: Office of Government Ethics Advance Notice of Proposed Rulemaking for Consideration
in Developing a Legal Expense Fund Regulation,
84 Fed. Reg. 72, 15146–47 (Apr. 15, 2019) [RIN 3209-AA50]

To Whom It May Concern:

On April 15, 2019, the U.S. Office of Government Ethics (“OGE” or “the Office”) issued an Advance Notice of Proposed Rulemaking soliciting comments to be considered in developing a Legal Expense Fund regulation. OGE should promulgate a Legal Expense Fund regulation that provides transparency, allows public scrutiny, allows the Office to carry out effective oversight, and ensures accountability for receiving funds from sources that would create conflicts of interest.

I. Introduction

A. American Oversight Is Dedicated to Ensuring Government Transparency and Promoting Accountability.

American Oversight is a non-profit, non-partisan organization dedicated to ensuring government transparency and promoting accountability for government officials. Using Freedom of Information Act requests and other public records laws, American Oversight conducts investigations of government actions and seeks to uncover misconduct, including violations of ethics laws. American Oversight uses the information it uncovers to educate the public and alert appropriate authorities to questionable or unethical conduct of government officials. American Oversight’s work to ensure government transparency and promote accountability for public officials informs the recommendations made here regarding the regulation of legal expense funds for executive branch employees and officers. American Oversight relies on OGE’s regulations, which set the standards for judging the propriety of government officials’ conduct.

B. Transparency Is Vital to Preventing Conflicts of Interest, Ensuring Effective Oversight, and Maintaining Public Confidence.

Public disclosure and transparency are crucial to ensure that OGE, the public, and government watchdog groups can conduct oversight to ensure that federal officials comply with ethics requirements. For example, watchdog groups like American Oversight were only able to identify potential ethical violations of Commerce Secretary Wilbur Ross because OGE requires high-ranking officials and nominees to file public financial disclosure reports.¹ Increasing public disclosure and transparency for legal expense funds used by executive branch officials is crucial to ensure that OGE, Congress, and watchdog groups are able to effectively oversee the donations public officials receive, to ensure that the funds do not

¹ See Carrie Levine, ‘Not in Compliance,’: Wilbur Ross, The Trump Official Who Keeps Watchdogs Up At Night, NPR (Feb. 27, 2019, 6:30 AM), <https://www.npr.org/2019/02/27/696824206/not-in-compliance-wilbur-ross-the-trump-official-who-keeps-watchdogs-up-at-night>.



facilitate conflicts of interest and corruption, and to instill public confidence in the integrity of the executive branch. In recent years, the absence of any regulation governing executive branch officials' use of legal expense trusts has contributed to questionable uses of such legal defense funds, which, as described below, may have resulted in conflicts of interest and which have certainly resulted in the appearance of corruption.

EPA Administrator Pruitt's Legal Defense Fund

Then-Environmental Protection Agency ("EPA") Administrator Scott Pruitt's 2018 creation of a legal expenses trust illustrates examples of the potential corruption that such funds, without effective regulation, may enable and the ways in which public confidence in the executive branch can be undermined by the lack of transparency regarding the interests of the donors to such funds. At the time of the fund's creation, Pruitt was the subject of numerous investigations and ethics complaints.² Pruitt's lawyer solicited donations to the fund, including a \$50,000 donation from prominent Republican donor Diane Hendricks. Ms. Hendricks is chairwoman of ABC Roofing Supply Co. Inc. and Hendricks Holding Co. and has donated millions of dollars to Republican candidates for office.³ Though the full extent of Ms. Hendricks's interests affected by the EPA are still not known, public reporting has identified numerous facilities owned by her companies that have been subject to EPA inspection or inspection by state agencies overseen by EPA.⁴ Despite this potential source of a conflict of interest, Pruitt's fund accepted Hendricks' contribution before Pruitt's lawyer consulted with OGE or EPA ethics officials.⁵

It is possible that Ms. Hendricks was a prohibited source from whom then-Administrator Pruitt was barred from receiving anything of value if her interests may have been substantially affected by Pruitt's performance of his official duties.⁶ At a minimum, Mr. Pruitt's acceptance of such a significant gift from Ms. Hendricks—a sum nearly 20 times the federal election campaign contribution limit—without even consulting agency ethics officials created the appearance of corruption and served to undermine public confidence in the integrity of the EPA's leadership.

The "Patriot Legal Expense Fund Trust" for Un-Named Beneficiaries

The Patriot Legal Expense Fund Trust has raised additional serious concerns regarding the potential for corruption created by legal expense funds and has demonstrated the need for tools that will allow for effective oversight of such funds. In early 2018, certain undisclosed supporters of the Trump administration formed the Patriot Legal Expense Fund to pay the legal expenses of aides and former aides to President Trump stemming from investigations of the Trump administration and the Trump campaign.⁷ The firm Wiley Rein LLP filed the fund's paperwork, but it remains unclear who initially financed and sought to create the fund.⁸ Upon its creation, the fund, unlike most previous legal defense

² Umair Irfan, *The Scandal-Plagued EPA Administrator Wants Contributions to His Legal Defense Fund*, Vox (May 17, 2018, 2:22 PM), <https://www.vox.com/energy-and-environment/2018/5/17/17361562/scott-pruitt-legal-defense-fund-scandal>.

³ Kevin Bogardus, *Pruitt's Lawyer Sought Billionaire's Help for Fund*, E&E NEWS, Apr. 24, 2019, <https://www.eenews.net/greenwire/2019/04/24/stories/1060211709>.

⁴ *Id.*

⁵ *Id.*

⁶ 5 U.S.C. § 7353.

⁷ Michelle Ye Hee Lee, *Legal Defense Fund for Trump Aides Launches Amid Questions About Donor Transparency*, WASH. POST, Feb. 28, 2018, https://www.washingtonpost.com/politics/legal-defense-fund-for-trump-aides-launches-amid-questions-about-donor-transparency/2018/02/28/ea7a8c92-1a6d-11e8-9de1-147dd2df3829_story.html?utm_term=.0f4397f2a50c.

⁸ *Id.*



funds, was not limited to a single beneficiary and did not specify which aides to the president would receive disbursements of funds for legal expenses.⁹ The fund has declined even to identify the aides who have subsequently received payments.¹⁰ Without reporting which government officials and employees have received funds, it is nearly impossible for OGE, Congress, or non-profit watchdog groups to conduct effective oversight to determine if government officials have received gifts from prohibited sources through the vehicle of this legal expense fund.

What little public information is available regarding the Patriot Legal Expense Fund only serves to heighten concerns about its effects on the ethics compliance of executive branch officials. The fund has received very large contributions from individuals who have financial interests that have been substantially affected by Trump administration policies or could be so affected. Most prominently, casino owner Sheldon Adelson and his wife Miriam Adelson donated \$500,000 to the fund in late 2018.¹¹ Months later, the Trump administration's Department of Justice Office of Legal Counsel ("OLC") issued a reinterpretation of the Wire Act long sought by Mr. Adelson, which would make it more difficult for online gambling to compete with his casinos.¹² Because the administration officials receiving payments from the Patriot Legal Expense Fund are unknown, it is not possible to determine whether any funds have been directed to officials with influence over or involvement in this Trump administration shift.

C. OGE Has Ample Legal Authority to Regulate Legal Expense Trusts.

OGE has ample legal authority to regulate the use of legal expense trusts for the benefit of executive branch officers and employees. The OGE Director has broad authority to develop and promulgate regulations "pertaining to conflicts of interest and ethics in the executive branch,"¹³ and OGE has specific authority to issue rules or regulations implementing the statutory prohibition on executive officers or employees accepting anything of value from anyone seeking official action from the officer or employee's federal entity or whose interests may be substantially affected by the performance or nonperformance of the officer or employee's official duties.¹⁴ Regulation of legal expense funds benefiting executive branch officers and employees plainly falls within OGE's broad authority to regulate conflicts of interest and ethics as well as OGE's specific authority to implement the statutory bar on the receipt of gifts from prohibited sources.

II. OGE Must Include Provisions that Require Transparency and Public Disclosure to Prevent Conflicts of Interest and Ensure Public Confidence.

As described above, without effective regulation legal expense trusts can become opaque vehicles for potential corruption. Without regulation, the public cannot have any confidence that the executive branch officials benefiting from legal expense funds are not accepting large gifts—reaching to the tens

⁹ *Id.*

¹⁰ Jeremy Diamond, *Pro-Trump Legal Fund Making Payments, But Won't Say Who's Benefiting*, CNN (Oct. 15, 2018, 2:47 PM), <https://www.cnn.com/2018/10/15/politics/patriot-legal-expense-fund-trust-trump-campaign/index.html>.

¹¹ Maggie Severns, *Adelsons Pumped \$500K Into Trump Aides' Legal Defense Fund*, POLITICO (Jan. 31, 2019, 10:28 PM), <https://www.politico.com/story/2019/01/31/sheldon-adelson-trump-aides-legal-defense-1140928>.

¹² Tom Hamburger, *Justice Department Decision to Issue Legal Opinion Long Sought by Casino Magnate Sheldon Adelson Draws Criticism*, WASH. POST, Feb. 7, 2019, https://www.washingtonpost.com/politics/justice-department-decision-to-issue-legal-opinion-long-sought-by-casino-magnate-sheldon-adelson-draws-criticism/2019/02/07/fb705da6-2ae8-11e9-b011-d8500644dc98_story.html?utm_term=.437eeb9b94f5.

¹³ 5 U.S.C. App. § 402 (b)(1).

¹⁴ 5 U.S.C. § 7353 (a)-(b).



and hundreds of thousands of dollars—from individuals who stand to benefit from the power those officials hold in the public trust.

Transparency is crucial to ensuring that OGE, Congress, watchdog groups, and the public can conduct basic oversight to ensure that legal expense funds do not result in large gifts to executive branch officials from prohibited sources, and to ensure that executive branch officials receive scrutiny on other potential conflicts of interest arising from legal expense funds. To create transparency and allow for effective oversight, OGE should promulgate regulations that include the following reporting and transparency requirements:

- (a) Donors to legal expense trusts who contribute over \$200¹⁵ annually should be required to contemporaneously report their name, the amount contributed, their city and state of residence, employer, and any of their interest(s) that may be affected by the actions or inaction of the federal executive branch entity or entities employing the individual(s) who may benefit from the donor's contribution;
- (b) Donors should be required to attest to the accuracy of this information and sign the form created for disclosing this information;
- (c) The disclosure of such donor information should be filed with OGE within seven days of making such a donation;
- (d) Legal expense trusts should be required to identify a trustee or administrator (who is not the beneficiary), and the trustee or administrator should also be required to collect the above information from all donors who contribute over \$200 annually and include that information in quarterly reports to OGE and the ethics officials¹⁶ at the executive branch agency employing the beneficiary;
- (e) The information donors are required to disclose should be made promptly available to the public and to agency ethics officials to allow for effective oversight of potential violations of 5 U.S.C. § 7353 and other conflicts of interest arising from such donations.

Requiring reporting of significant donations to legal expense funds and requiring that such disclosures be made available to the public and agency ethics officials will prevent some of the most egregious potential abuses of legal defense funds.

First and foremost, if the requirements above are integrated into a forthcoming regulation, OGE and agency ethics officials will have the basic information necessary to identify potential conflicts of interest, including whether donors are prohibited sources barred from making a gift to a fund's beneficiary. In the case of former EPA Administrator Scott Pruitt's legal expense fund, agency officials were unable to

¹⁵ \$200 is the contribution threshold that triggers significant disclosure requirements in the context of political campaign contributions. 52 U.S.C. § 30104 (b)(3). Although the exact dollar amount that should trigger reporting and disclosure requirements could be reasonably be debated, all donors who make significant donations should be subject to reporting requirements. Donations of \$1,000 or more, for example, should undoubtedly be subject to reporting and disclosure requirements.

¹⁶ This requirement will serve to create a reporting redundancy to ensure that no significant donations are erroneously unreported by donors. The requirement may also assist relevant agency ethics officials in identifying all relevant disclosures.



readily obtain contemporaneous information about the fund's donors.¹⁷ As a result, when Diane Hendricks, owner of a company with numerous permits from the EPA and state agencies acting under the EPA's oversight, donated \$50,000 to Mr. Pruitt's fund, agency ethics officials with the knowledge and expertise necessary to determine whether Ms. Hendricks was a prohibited source were unable to make such a determination.¹⁸ At worst, this lack of transparency enabled a substantial, unlawful gift to a high-ranking government official. At best, as evidenced by the wide coverage this donation eventually received, the lack of transparency and oversight undermined public confidence in the integrity of EPA's operations.¹⁹

Moreover, prompt public disclosure of significant donations to the legal expense funds of public officials will provide the transparency necessary for the public and government watchdog groups—like American Oversight—to raise questions when potential conflicts of interest arise from such donations or when donors appear to be prohibited sources of funds. Many federal statutes embody the idea that such transparency is necessary to allow the public to effectively petition their government,²⁰ and transparent disclosure will aid in preventing unlawful donations as many investigations of ethical misconduct, or sanctions imposed for such conduct, are prompted by concerns raised by watchdog groups.²¹

The transparency provisions that American Oversight recommends here are the bare minimum requirements that a legal expense fund regulation should include. These requirements should not be read to suggest that American Oversight believes additional OGE oversight requirements should not be included in such a regulation.

III. OGE Must Require that Legal Expense Trusts Be Limited to a Single, Defined Beneficiary to Allow for Effective Oversight.

In order to ensure effective transparency and oversight of legal expense funds, OGE must also include an additional requirement limiting legal expense trusts to a single, defined, publicly disclosed beneficiary. Without such a requirement, the risk that beneficiary federal government officers and employees will receive funds from prohibited sources is greatly increased. As an initial matter, it is essential to require that legal expense funds identify the executive branch officer or employee that they will benefit so as to allow ethics officials to give clear, accurate guidance and to allow OGE to conduct effective oversight of whether donors are prohibited sources. Effective oversight and guidance will be further served by the

¹⁷ Bogardus, *supra* note 2.

¹⁸ *Id.*

¹⁹ See Irfan, *supra* note 1; Bogardus, *supra* note 2; Alex Guillen, *Pruitt Legal Fundraising Started Months Before His Exit*, POLITICO (Feb. 5, 2019, 10:00 AM), <https://www.politico.com/story/2019/02/05/scott-pruitt-legal-fundraising-1145909>; Rebecca Leber, *Scott Pruitt is Facing Yet Another Scandal Thanks to His Legal Defense Fund*, MOTHER JONES, Jan. 10, 2019, <https://www.motherjones.com/environment/2019/01/scott-pruitt-epa-legal-defense-fund-diane-hendricks-senate-democrats/>; Kevin Bogardus, *Meet the Self-Made Billionaire in Pruitt's Corner*, E&E NEWS, Dec. 7, 2018, <https://www.eenews.net/stories/1060109095>; Timothy Cama, *GOP Donor Gave Pruitt \$50,000 for Legal Defense*, THE HILL (Dec. 6, 2018, 6:56 PM), <https://thehill.com/policy/energy-environment/420176-gop-donor-gave-pruitt-50000-for-legal-defense>.

²⁰ See, e.g., 5 U.S.C. 552; 52 U.S.C. § 30104 (b)(3).

²¹ See, e.g., AMERICAN OVERSIGHT, *OSC Finds FCC Commissioner O'Rielly Violated Hatch Act*, May, 1, 2018, <https://www.americanoversight.org/osc-finds-fcc-commissioner-orielly-violated-hatch-act>; AMERICAN OVERSIGHT, *OSC Opens Whitaker Case File in Response to American Oversight Request*, Nov. 21, 2018, <https://www.americanoversight.org/new-letters-whitaker-disclosure-forms-raise-ethics-and-hatch-act-concerns>; Libby Watson, *FEC Fines Koch Groups for Illegal Dark Money*, SUNLIGHT FOUNDATION (Jul. 13, 2016, 12:19 PM), <https://sunlightfoundation.com/2016/07/13/fec-fines-koch-groups-for-illegal-dark-money/>.



clarity afforded by a fund having a single beneficiary, which would prevent the co-mingling of funds from donors that may have interests that may be affected by one beneficiary but not another. Finally, the identity of the beneficiary must be disclosed to allow for the transparency that will enable the public and watchdog groups to buttress the oversight necessary to prevent conflicts of interest and to hold government officials accountable for receipt of unlawful contributions from prohibited sources. This limitation is crucial to effective oversight, true transparency, and maintaining public confidence in the integrity of the executive branch.

The serious questions raised by the sprawling, opaque example of the Patriot Legal Expense Fund Trust demonstrate why it is crucial that legal expense funds be limited to a single, defined, publicly disclosed executive branch officer or employee beneficiary. As noted above, the Patriot Legal Expense Fund was created to benefit numerous, un-identified and un-determined members of the Trump administration, as well as former members of the Trump campaign.²² It remains unclear which members of the Trump administration have benefited from the fund, and, consequently, the public and watchdog groups are unable to scrutinize whether the beneficiaries of the fund may substantially affect the interests of the fund's donors.²³ The opaque nature of this arrangement hinders oversight and undermines public confidence in the integrity of executive branch officials. In particular, neither the public nor agency ethics officials can readily scrutinize or investigate whether any beneficiaries of Mr. Adelson's large contributions had influence over or involvement with OLC's recent reinterpretation of the Wire Act in favor of Mr. Adelson's long-held view that it prohibits online gambling operations that compete with his casinos.²⁴

IV. Conclusion

American Oversight urges OGE to adopt a regulation that would, at a minimum, require the reporting, disclosure, and transparency necessary to ensure that OGE, agency ethics officials, Congress, non-profit watchdog groups, and the public can conduct oversight of the executive branch officials' use of legal expense trusts. American Oversight respectfully submits this comment recommending minimum requirements that would assist in achieving this necessary transparency.

Sincerely,



Austin Evers
Executive Director
American Oversight

The signature is handwritten in blue ink and appears to read "Austin Evers". Below the signature, the name "Austin Evers" is printed in a standard black font, followed by "Executive Director" and "American Oversight" on separate lines.

²² Ye Hee Lee, *supra* note 6; Diamond, *supra* note 9.

²³ *Id.*

²⁴ Severns, *supra* note 10.